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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-839

EDMUND FOLEY, individually and on behalf of all other persons similarly situated,

Appellants,

against

WILLIAM G. CONNELIE, individually and in his capacity as Superintendent of the New York State Police, and S. A. SMITH, individually and in his capacity as Director of Personnel of the New York State Police,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEES

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Appellees
2 World Trade Center
New York, New York 10047

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

JUDITH A. GORDON
Assistant Attorney General
Of Counsel

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Edmund Foley, individually and on behalf of all other persons similarly situated,

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William G. Connelie, individually and in his capacity as Superintendent of the New York State Police, and S. A. Smith, individually and in his capacity as Director of Personnel of the New York State Police,

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEES

Statement of the Case

Appellant Foley has lived in New York State as a permanent resident alien since February, 1973 (D. 7†).* In

† References prefixed by the letter "D" refer to the Appendix filed on this appeal.

* Neither the date plaintiff first entered the United States nor his entering status is alleged (D. 7, D. 17).

August, 1975, appellant applied to compete in the then forthcoming September examination series for appointment as a member of the New York State Police (D. 10). His application was denied because, as an alien, he was not qualified for appointment (D. 10, D. 15). New York Executive Law § 215(3).

By order dated September 19, 1975, District Judge Pollack permitted appellant to compete in the September examination series without obtaining any right to appointment.* Appellant ranked 3,183 on the resulting eligible list of 3,627 passing candidates. Appellees have appointed 75 candidates to date (through number 135 on the eligible list). One hundred and fifty (150) additional appointments are pending. The eligible list was established on June 1, 1976 and will probably be superseded by a list from a new examination series on or about December 30, 1979. Executive Law § 215(3); 9 New York Code, Rules and Regulations ("N.Y.C.R.R.") § 475.1.

Although the record is silent as to both the date appellant first entered the United States as a permanent resident and his age, he repeatedly alleges that he was not in this country long enough to become naturalized prior to the September 1975 examination series and that he will be too old to meet the statutory age requirement for appointment in succeeding examination series. Appellant's brief ("Brief"), pp. 17 note, 26 and note; Reply brief in the district court, p. 10; and MANSFIELD, C.J. dissenting, A. 47n.1. Appellant can be naturalized within five years from the date of his permanent residence, 8 U.S.C. § 1427(a), or within three years if he performs military service. 8 U.S.C. § 1439(a). Appointees to the State

* The substance of this initial order has been continued to date by the district court with the consent of the appellees (B-1). References prefixed by the letters "A," "B" or "C" refer to the respective Appendices to the Jurisdictional Statement filed on this appeal.

Police are generally required to be between 21 and 29 years of age, but the Superintendent may extend the maximum age to 35. Executive Law § 215(3); 9 N.Y.C.R.R. § 475.1. Extensions of the 29 year limit for up to 6 years are mandatory for military service. Executive Law § 215(3).

The New York State Police

The New York State Police is a division of the executive branch of the state government. Executive Law § 31(4). The Governor is the Commander-in-Chief (D-24). The principal executive officer is the Superintendent who is a member of the Governor's cabinet and appointed with the advice and consent of the State Senate. Executive Law § 210. The force was created in 1917. New York Laws, c. 161 (April 12, 1917). The original legislation required that all members be citizens, *Ibid.*, and this requirement has been enforced to date without exception or modification (D. 26-D. 27). Executive Law § 215(3).*

The State Police is the only police force in New York with statewide jurisdiction (A. 28, D. 25). Executive Law § 223. When operating within the territory of a political subdivision, its jurisdiction is concurrent with, not preempted by, that of the local police (D. 25).** Generally stated, the purposes of State Police are to prevent and detect crime and apprehend criminals, to prevent and detect subversion and other threats to state security and to maintain good public order. Executive Law § 223; Con-

* In addition to being citizens, eligible appointees must meet age requirements, be physically and mentally fit, have good moral character and pass the appropriate competitive tests. Executive Law § 215(3); 9 N.Y.C.R.R. § 475.1.

** The only circumstance in which State Police may not operate within a locality is to suppress rioting and disorder within a city. They must then await the direction of the Governor. Executive Law § 223. Majority opinion, A. 26-A. 27, A. 29.

nelie affidavit, D. 24, D. 29.* In pursuit of these purposes, the State Police co-operate with federal authorities in the investigation of violations of federal felony laws, Executive Law § 216, and with all state and local authorities. Executive Law § 223; Connelie affidavit, D. 28, D. 29-D. 30. In 1974, the State Police made over 50,000 arrests for felonies, misdemeanors and offenses, for crimes ranging from homicide and assault to larceny and drug violations, in addition to issuing over 500,000 summonses for vehicle and traffic violations. Connelie affidavit, D. 28. Two hundred of the arrests were for violations of the federal immigration laws and were made in co-operation with federal authorities (D. 30). See majority opinion, A. 25-A. 27, A. 28, A. 29, A. 32-A. 33.

State Police Officers enforce the New York Penal Law and numerous other statutes describing criminal and quasi-criminal behavior including New York's Criminal Procedure Law, Public Health Law, Mental Hygiene Law and Conservation Law.** Executive Law §§ 223, 225. Connelie affidavit, D. 24, D. 25-D. 26. In pursuit of these duties, State Police Officers are empowered to "arrest, without a warrant, any person committing or attempting to commit within their presence or view a breach of the peace or other violation of law" and "to serve and execute warrants of arrest or search" in any part of the state according to the tenor of their indorsement. Executive Law § 223; Connelie affidavit, D. 24-D. 25. Officers are on call 24 hours a day. They must carry a weapon while on duty and are authorized to do so while off-duty. Connelie affidavit, D. 25.

They must take appropriate action whenever they believe a crime has been committed. Executive Law § 223; Connelie affidavit, D. 24-D. 25. "A police officer on 'off-

* State Police officers also act as prosecutors of vehicle and traffic offenses in local justice courts. Connelie affidavit, D. 31.

** The State Police also hold and dispose of lost personal property. Executive Law § 225-a. Majority opinion, A. 27.

duty' status is nevertheless not relieved of his obligation as an officer to preserve the public peace and to protect the lives and property of the public in general." *People v. Peters,* 44 Misc. 2d 470, 254 N.Y.S. 2d 10, 12 (Sup. Ct. Westchester Co. 1964). In all their actions, officers must observe a zealous regard for the constitutional and statutory rights and liberties of the individuals with whom they come in contact. Connelie affidavit, D. 30-D. 31. See majority opinion, A. 26-A. 27, A. 28.

The New York State Police consists of approximately 3,316 men and women (D. 24). There are three functional units: the Governor's Detail which protects the life of the state's Chief Executive and the lives of visiting foreign dignitaries (D. 29, A. 36); the Bureau of Criminal Investigation ("BCI") consisting of "plainclothes" detectives who conduct investigations of state security matters and organized crime and continue investigations initiated by uniformed officers when necessary (D. 27-D. 28; Executive Law § 216); and the Uniform Force which, through patrol and investigation, provides a "first-line" response (D. 27-D. 28). Members are deployed in nine Troops and at Albany central office. Each Troop has a headquarters and substations and covers a distinct geographic region of the state. Troops have between 200 and 380 members including both uniformed and BCI personnel.* Executive Law § 215(1); Connelie affidavit, D. 32-D. 33). Assignments within a Troop are rotated routinely approximately every two weeks, and Troop assignments are generally rotated every two years.

All members are assigned a "para-military" rank, e.g. Trooper (the entry-level position), Sergeant, Lieutenant, Captain, Major. Executive Law §§ 215(1)(b), 216; Connelie affidavit, D. 24, D. 32. Appointments and promotions in the Uniform Force for the ranks of Trooper through

* Troop T Thruway has no BCI personnel.

Lieutenant are made on the basis of competitive tests and Superintendent discretion. Executive Law § 215(3); 9 N.Y.C.R.R. § 475.1; Connelie affidavit, D. 33. Other appointments are within the Superintendent's discretion. However, all members in good standing are initially considered eligible for promotion. Executive Law § 216(1); Connelie affidavit, D. 33.

Appellant's characterization of the State Police as "para-military" in the sense that it is a "military hierarchy with strict accountability to superiors," "control over individual troopers . . . at all times," and "[s]uperior officers[']* exercise of authority contemporaneous to the officer's activity" is without foundation in the record. Brief pp. 11-12, 18, 33. Dissenting opinion, A. 42, A. 52-A. 53, A. 64. In fact, the unrebutted evidence of Superintendent Connelie is expressly to the contrary (D. 31): "Because *most police work is conducted beyond direct supervision,* we must rely upon each officer's faithful and undivided allegiance to the Constitution and the individual rights guaranteed by it . . . ." (Emphasis added.) See majority opinion, A. 24. *Owen* v. *Barry,* 483 F.2d 1126, 1128-29 (2d Cir. 1973), rejecting analogy between military and civilian police force. American Bar Association, Standards Relating to the Urban Police Function, § 4.1, p. 117 (tent. draft 1972) ("ABA Standards"), rejecting "persistent myth" that police are ministerial officers.

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* The State Police Academy currently requires that probationary Troopers be rated, *inter alia,* on their ability to work without supervision and to assume responsibility. The ratings are administered by peers and supervisors three times during the 20 week training program given to new members. See Executive Law § 215(3); 9 N.Y.C.R.R. §§ 475.1, 475.2.

Summary of Argument

The New York State Police prevent, detect and prosecute crime to protect the security of the state and the well-being of all of its residents. They perform the discretionary, sovereign functions of arrest and search and control the legitimate use of force in civilian society.

Executive Law § 215(3) distinguishes between citizens and aliens for the specific and limited purpose of qualifying the members of this police force. The classification so established consists of "important nonelective executive . . . officers who participate directly in the formulation, execution, or review of broad public policy," *Sugarman* v. *Dougall,* 413 U.S. 634, 647 (1973), from which aliens may be excluded under a test of reasonableness. *Ibid.* Section 215(3) also survives strict scrutiny under the Equal Protection Clause because it is precisely drawn to effectuate New York's substantial interests in defining and preserving its "political community." *Dunn* v. *Blumstein,* 405 U.S. 330, 344 (1972).

POINT I

Executive Law § 215(3) does not violate the Equal Protection Clause because it excludes aliens from membership in the New York State Police. State Police perform discretionary, sovereign functions for which the alien is unsuited because of his continuing allegiance to the country of his nationality. Although properly reviewed under the traditional equal protection test, Section 215(3) survives strict scrutiny because the state interests are substantial and the classification is precise.

A. The traditional equal protection test requiring a showing of only a reasonable relation to a legitimate state interest is applicable to Executive Law § 215(3).

New York State Police Officers perform discretionary, sovereign functions for the preservation of state government and for the protection of all persons within New York. Majority opinion, A. 22-A. 24. They are "persons holding . . . important non-elective executive . . . positions . . . who participate directly in the formulation, execution or review of broad public policy [and therefore] perform functions that go to the heart of representative government." *Sugarman* v. *Dougall*, 413 U.S. 634, 647 (1973). Majority opinion, A. 23.* Executive Law § 215(3) distinguishes between citizens and aliens for the sole purpose of qualifying these Officers. The resulting classification is "closely" and "appropriately" "defined," "uniform and consistent" and related to the "'special demands of [a] particular position'" or "class of positions." 413 U.S. at 639, 647 in part quoting decision below, 339 F. Supp. 906, 911 (S.D.N.Y. 1971) (LUMBARD, C.J. concurring). It is, therefore, properly excepted from strict equal protection scrutiny under the standards established

* See pp. 13-17 *post*, for a discussion of the sovereign nature and importance of the State Police Officer's responsibilities.

by this Court in *Sugarman* v. *Dougall*, *supra* at 642-43, 647-49 (applying heightened test to citizenship requirement that included menial and high public positions but stating that scrutiny of such requirements for appropriately defined classes of public office holders would not be so demanding). See *In Re Griffiths*, 413 U.S. 717, 729 (1973), applying heightened test to citizenship requirement for admission to the bar but finding that attorneys were not public office holders by virtue of their professional status.

The continuing appropriateness of the reasonable relation test to certain classifications "based on alienage," *Graham* v. *Richardson*, 403 U.S. 365, 372 (1971), recognizes the constitutional power of the states to establish their own republican form of government, U. S. Const. Art. IV, § 4, and the reservation of all powers not delegated to the federal government to states and to the people. U. S. Const. Amdt. X. *Sugarman* v. *Dougall*, *supra* at 647-49. Acting within these powers and consistently with the obligation "to preserve the basic conception of a political community," *Dunn* v. *Blumstein*, 405 U.S. 330, 344 (1972), a state may prescribe the qualifications of its own officers and invoke alienage as a criterion for that purpose since alienage itself is a basis for exclusion from democratic political processes and a factor that reasonably can be employed in defining "political community." *Sugarman* v. *Dougall*, *supra* and cases cited. *Nyquist* v. *Mauclet*, —— U.S. ——, 97 S.Ct. 2120, 2126 (1977). As the district court majority correctly observed (A. 22), the judicial solicitude reflected in strict scrutiny is intended to protect the interests of aliens when political processes may be insufficient for that purpose, not to open those processes to alien participation.

The application of the reasonable relation test to Executive Law § 215(3) is not opposed by the prior decisions of this Court in favor of aliens' rights of access to state regulated employment or benefits. *Examining Board* v. *Flores*

de Otero, 426 U.S. 572 (1976) (civil engineering), like *Dougall* and *Griffiths*, involved "common occupations of the community." *Truax* v. *Raich*, 239 U.S. 33, 41 (1915). See also *Hampton* v. *Mow Sun Wong*, 426 U.S. 88 (1976) (federal civil service employment). -The exclusion of non-declarant aliens from grants and loans considered in *Nyquist* v. *Mauclet*, *supra*, was held too remote from the state's interest in defining and preserving its "political community" to warrant review under the relaxed standard, and the exclusion of aliens from welfare benefits considered in *Graham* v. *Richardson*, *supra*, unrelated to any permissible state interest. No decision has rejected the application of the reasonable relation test to the exclusion of aliens from an appropriately defined class of state offices.*

Appellant's reliance on *Trimble* v. *Gordon*, — U. S. — 45 U.S.L.W. 4395 (April 26, 1977) and *Weber* v. *Aetna Casualty & Surety Co.*, 406 U. S. 164 (1972), is misplaced. Brief, pp. 16-17. Those cases do not apply a strict scrutiny standard. Nor are aliens similarly situated with illegitimate children. The alien can change his status; the illegitimate child cannot. While illegitimacy may be an irrelevant characteristic for most all regulatory purposes, alienage is relevant to qualifying for state office. *Sugarman* v. *Dougall*, *supra*, and at 657 (REHNQUIST, J. dissenting). See Das, *Discrimination in Employment Against*

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* The lower court opinions cited as supporting in the Brief, *Amici Curiae*, p. 16 n. 28, are distinguishable from the case at bar on the ground that they, like *Flores de Otero*, *Dougall* and *Griffiths*, involved limitations on access to "common occupations," not state offices. The only lower court opinion in which state office is considered is *Chavez-Salido* v. *Cabell*, 427 F. Supp. 158, 159-71 (C.D. Cal. 1977), Jurisdictional Statement filed, —— U.S. —— (No. 76-1616, May 17, 1977). There the district court invalidated a citizenship requirement applicable to all "peace officers" noting that the statute swept indiscriminately in its coverage of menial (cemetery employees) and important (Sheriff) law enforcement positions. Executive Law § 215 (3) does not present a comparable issue.

Aliens—The Impact of the Constitution and Federal Civil Rights Laws, 35 U. Pitt. L. Rev. 499, 520 (1974) ("Das"), stating that once a state has determined that a class of positions should be closed to aliens because it involves direct participation in government under the *Dougall* standard, that determination should not be rejected by the court if it is reasonable even though a narrower classification might also be reasonable; Nowak, *Realigning the Standards of Review Under the Equal Protection Guarantee—Prohibited, Neutral and Permissive Classifications*, 62 Geo. L.J. 1071, 1097 (1974), reading *Dougall* as requiring a showing of only a theoretical rational relationship to the special demands of a particular class of positions; Note, *Wandering Between Two Worlds: Employment Discrimination Against Aliens*, 16 Va. J. Int'l L. 355, 397-98 (1976), noting differences between illegitimacy and alien status.

If Executive Law § 215(3) is strictly scrutinized, the inquiry is limited to whether or not New York has shown that its purpose or interest in the statute is "both constitutionally permissible and substantial and that its use of the classification is necessary . . . to the accomplishment of its purpose or the safeguarding of its interest." *In Re Griffiths*, *supra* at 721-22 (footnotes omitted). *Examining Board* v. *Flores deOtero*, *supra* at 602; *Sugarman* v. *Dougall*, *supra* at 642. The district court majority assumed the applicability of this test for purposes of its disposition and sustained the statute (A. 24- A. 41). Compare Brief, p. 5; Brief, *Amici Curiae*, pp. 2-3. Accord, *Perkins* v. *Smith*, 370 F. Supp. 134, 136 (D. Md. 1974), *aff'd* 426 U.S. 913 (1976) and *United States* v. *Gordon-Nikkar*, 518 F. 2d 972, 976 (5th Cir. 1975), both applying strict scrutiny *arguendo* to aliens' exclusion from federal and state grand and petit juries and sustaining exclusion.

B. The exclusion of aliens from the New York State Police under Executive Law § 215(3) bears a "necessary" relation to "substantial" state interests in the integrity of that force. State Police perform discretionary, sovereign functions for which the alien is unsuited because of his continuing allegiance to the country of his nationality.

A state is constitutionally empowered to conduct its sovereign affairs through the exclusive agency of its own citizens. *Sugarman* v. *Dougall, supra* at 642-43, 646-49. This principle rests on the fundamental identity between a state and its own people, or citizens. *Afroyim* v. *Rusk*, 387 U.S. 253, 268 (1967); *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 596 (1952) (*Frankfurter, J.* concurring), *United States* v. *Cruikshank*, 92 U.S. 542, 549 (1896); *Minor* v. *Happersett*, 21 Wall. 162, 165-66 (1875). An alien, by definition, does not share this fundamental identity. Gordon & Rosenfeld, IMMIGRATION LAW AND PROCEDURE, § 11.3a (1976 rev. ed.) ("Gordon & Rosenfeld"); Borchard, DIPLOMATIC PROTECTION OF CITIZENS ABROAD, §§ 4, 5 (1927) ("Borchard"); Comment, *Aliens' Right to Work: State and Federal Discrimination*, 45 Fordh. L. Rev. 835, 841-42 (1977) ("Aliens' Right to Work"). As a result, he may be excluded from participation in the government of his host state including appointive public office. *Sugarman* v. *Dougall, supra*. See *Dunn* v. *Blumstein, supra*, a state may limit participation in its government to "preserve the basic conception of a political community." Gordon & Rosenfeld, § 1.38; Borchard, § 34; McDougal, Lasswell & Chen, *The Protection of Aliens from Discrimination and World Public Order: Responsibility of States Conjoined with Human Rights*, 70 Am. J. Int'l L. 432 (1976), stating (at p. 433) that "[a]liens are . . . commonly denied access to voting and office-holding (appointive and elective alike)" and (at p. 438) that the "more important differential treatments that may be held permissible upon grounds of alienage would appear to be confined to those that relate

to participation in the making of community decisions (voting and office-holding)." (Footnotes omitted.); Das, pp. 516-518; Aliens' Right to Work, pp. 842-43. Indeed, as this Court has observed, the exclusion of aliens from a particular class of public offices evidences the governmental, or sovereign, nature of those offices since "alienage itself is a factor that reasonably could be employed in defining "political community." *Sugarman* v. *Dougall, supra* at 649.*

The district court majority found that New York's interest in the "maintenance of public order to effect the preservation of [its] political structure including the prevention, detection and prosecution of crime" provided compelling support for Executive Law § 215(3) (A. 38).** State Police Officers perform discretionary, sovereign functions to enforce this interest that "go to the heart of representative government." *Sugarman* v. *Dougall, supra* at 647. Majority opinion, A. 28-A. 37 and Connelie affidavit, D. 24-D.26, D. 27-D. 32. See Bent, THE POLITICS OF LAW ENFORCEMENT 2 (1974) ("Bent"), stating that the "enforcement of order is essential for the preservation of the State, and the police, as the agents charged with this responsibility, are intrinsic to this function at all levels of government,"*** and Hall, *Police and Law in a Democratic Society*, 28 Ind. L. J. 133, 141 (1953), stating that "policing in our culture is a public, political function." As such they constitute a class of "important nonelective executive . . . officers who participate directly in the formulation, execution or review of broad public policy" from which aliens may be excluded. *Sugarman* v. *Dougall, supra* and dis-

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* Aliens are excluded from positions as police officers in at least 29 states (A. 30-A. 32).

** Appellant concedes that these state interests are both permissible and substantial. Brief, p. 10.

*** Footnote omitted.

("Fisk") stating that the "power to arrest is political . . . because it is indispensable to the sovereignty of a government;" Bittner, *The Capacity to Use Force as the Core of the Police Role,* POLICE IN AMERICA 61, 62-67 (1975, Skolnick, ed.); Bent, p. 1; Hahn, *The Public and the Police,* POLICE IN URBAN SOCIETY 23 (1970, Hahn ed.); ABA Standards, § 2.1, pp. 49-50.

The Officer's exercise of his powers is discretionary. Fisk, pp. 3-6; Bent, p. 157; National Advisory Commission, § 1.3; ABA Standards, § 4.1, § 5.1, p. 145. His use of discretion arises from the fact that he operates under broadly stated and sometimes obsolete legislation, must establish enforcement priorities because of limited resources, often must respond immediately, often determines whether the public good is better served by an arrest or the failure to make an arrest and usually works alone or with one other Officer. LaFave, ARREST, THE DECISION TO TAKE A SUSPECT INTO CUSTODY 61-144 (1965) ("LaFave") and references last cited.

Commentators are generally agreed that police discretion is exercised most broadly and importantly by the lowest ranking officers on the force. J. Wilson, VARIETIES OF POLICE BEHAVIOR 8 (1968); Fisk, pp. 41-42; Hahn, p. 11; Bent, p. 157. Every time he determines whether or not to make an arrest or to use coercive force, the Officer must "weigh the evidence before him and judge which of the parties in conflict—individual or state—has the greater claim on the power residing within him." M. C. Dillon, *What Are Police For?* THE POLICE IN SOCIETY 16 (1972, Viano & Reiman eds.) The manner in which he acts is a "demonstration of his understanding and . . . a measure of [his] commitment to the political and social ideals of this country." Fisk, p. 9. Majority opinion, A. 29. Compare Brief, pp. 12-13, 15, 27, 30-32; Brief, *Amici Curiae,* pp. 20-24, 27-32; Dissenting opinion, A. 47-54.

cussion above, p. 9.* Commentators agree with the district court majority that the police officer's responsibilities are "awesome" (A. 28). Bent, p. 1; POLICE AND LAW ENFORCEMENT 1972, p. 417 (1973, Curran et al. eds.). This Court has similarly recognized the nature of the police officer's responsibilities by granting him qualified immunity akin to that of other high officers of the executive branch. *Scheuer* v. *Rhodes,* 416 U. S. 232, 245-46 (1974); *Pierson* v. *Ray,* 386 U. S. 547, 555-57 (1967).

New York recognized the sovereign role of the State Police Officer when it designated him a state civil, or public, officer, as distinguished from an employee, upon the creation of the force. Op. Atty. Gen., 13 N.Y. State Dep't 430 (1917) (A. 27-A.28).** Accord, *City of Albany* v. *Standard Accident Insurance Co.,* 8 A.D. 2d 247, 249, 187 N.Y.S.2d 242, 244 (Third Dep't 1959), police officers perform a governmental function. See *Sugarman* v. *Dougall, supra* at 640, noting that civil officers in New York exercise a portion of the sovereign power. This designation is attributable to the duties the officer performs and the manner in which he performs them.

The State Police Officer's powers of arrest and search and his control of the legitimate use of force in civilian society establish him as a sovereign officer of government. J. Fisk, THE POLICE OFFICER'S EXERCISE OF DISCRETION IN THE DECISION TO ARREST: RELATIONSHIP TO ORGANIZATIONAL GOALS AND SOCIETAL VALUES 9 (1974)

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* See also National Advisory Commission on Criminal Justice Standards and Goals, POLICE 9 (1973) ("National Advisory Commission"), stating: "The police in the United States are not separate from the people. They draw their authority from the will and consent of the people, and they recruit their officers from them. The police are instruments of the people to achieve and maintain order; their efforts are founded on principles of public service and ultimate responsibility to the public."

** New York Public Officers Law § 3 requires citizenship of all state civil officers. Appellant has not placed § 3 in issue.

The responsibilities of the State Police are no less sovereign or important than those of grand and petit juries from which aliens may also be excluded. Majority opinion, A. 29-A. 30. *Perkins* v. *Smith supra; United States* v. *Gordon-Nikkar, supra.* Both grand jurors, by indictment, and police officers, by arrest, are initiators of the criminal justice process. Both "decide which persons must answer to the state for alleged misdoings." *Perkins* v. *Smith,* 370 F. Supp. at 137. Both exercise non-reviewable discretion when they do not invoke the criminal process which, in the case of the police officer, "largely determine[s] the outer limits of law enforcement." J. Goldstein, *Police Discretion Not to Invoke the Criminal Process: Low-Visibility Decisions in the Administration of Justice,* 69 Yale L.J. 1 (1960); LaFave, pp. 61-144. Their factual determinations in this regard are "ultimate," like that of the petit juror in acquitting a criminal defendant, the petit juror's only non-reviewable, "unimpeachable" act. 370 F. Supp. at 136; Brief, p. 14. Grand and petit jurors in criminal cases apply broad legislative mandates to the facts as they "find" them. The police officer applies the same mandates in the same manner in the course of his daily routine albeit his role may be more significant since his obligation is continuing, and, as noted, his judgment alone initiates the criminal justice process. Both State Police Officers and jurors must resolve disputes in accordance with democratic principles and community mores, 370 F. Supp. at 140 (WINTER, J. concurring). Fisk, p. 9; Bent, p. 1. A single Police Officer, like a single juror, can "obstruct or distort the course of justice." 370 F. Supp. at 138. *United States* v. *Gordon-Nikkar, supra,* at 976. Accordingly, both classes of positions encompass functions that "go to the heart of representative government" from which aliens may be excluded. *Sugarman* v. *Dougall, supra* at 647. Compare Brief, pp. 13-14.

Appellants' identification with the attorney in *In Re Griffiths, supra,* rather than the jurors in *Perkins* v. *Smith,*

supra, and *United States* v. *Gordon-Nikkar, supra,* is unsound. Brief, pp. 19, 22. *Griffiths* held only that attorneys were not office holders as a result of their professional status because their activities might have only a tangential relationship to the affairs of government. It did not suggest that citizenship could not be required of attorneys who in fact held a public office.

In addition to the state's power to limit participation its government to its own citizens just reviewed, the alien possesses certain characteristics, incident to his status, which make him unsuited for the position of State Police Officer. Of particular importance is the denial of the right to vote in state and federal elections. *Sugarman* v. *Dougall, supra* at 648; *Oregon* v. *Mitchell,* 400 U.S. 112, 124-25 (1970) (BLACK, J.); *id.,* at 201 (HARLAN, J.); and *id.,* at 293-94 (STEWART, J.); *Kramer* v. *Union School District,* 395 U.S. 621, 625 (1969); *Reynolds* v. *Sims,* 377 U.S. 533, 567, 568 (1964). Appellant's position herein produces the anomalous result that individuals appointed to enforce the laws would have no voice in making the laws. Additionally, given this context, the alien's interest in enforcement would be more remote than that of the citizen although the *sine qua non* of the position is vigorous law enforcement. Other specific characteristics of alien status are reviewed in detail by the district court majority, A. 33-A. 35. All reflect the fact that the alien's primary allegiance to the country of his nationality continues until renounced in the course of naturalization. 8 U.S.C. § 1421 *et seq.* esp. § 1448.

Only recently, this Court recognized differing treatment citizens and aliens reflective of these characteristics as valid. *Mathews* v. *Diaz,* 426 U.S. 67, 78-79, 82-84 (1976), aliens with less than five years durational residence excluded from Medicare; *Perkins* v. *Smith,* 426 U.S. 913 (1976), affirming exclusion of aliens from juries on the basis of lower court opinions which rely on the alien's continuing allegiance to the country of his nationality and his

lack of demonstrable commitment to this country, 370 F. Supp. at 138 and at 139-42 (WINTER, J. concurring).

Appellant's reliance on the proposition that "'[r]esident aliens, like citizens, pay taxes, support the economy, serve in the [A]rmed [F]orces and contribute in myriad other ways to our society'" in support of his appointment to the State Police is misplaced. Brief, p. 25 quoting *In Re Griffiths, supra* at 722. *Nyquist* v. *Mauclet, supra* at 2127; *Sugarman* v. *Dougall, supra* at 645. Given the acceptance of both the cited proposition and the governmental participation standard in *Dougall,* they cannot be read against each other. See *Perkins* v. *Smith,* 370 F. Supp. at 135-36. Moreover, the alien is treated differently than the citizen in the Armed Forces, again reflecting the United States' acceptance of the alien's continuing identification with his homeland. See discussion above, p. 17. Only immigrant aliens are required to register for the draft, 50 U.S.C. App. § 456(a)(1), 32 C.F.R. § 1611.2(a), and immigrants may change their status to non-immigrant and thereby obtain an exemption from service. 8 U.S.C. § 1257(a); 32 C.F.R. § 1611.3. Resident aliens may also be exempted from service pursuant to treaty. 50 U.S.C. App. § 454 (a), 8 U.S.C. § 1101, 32 C.F.R. § 1611.2(b). Majority opinion, A. 34-A. 35. In 1976, there were fourteen such treaties in force, including one between the United States and the Republic of Ireland, appellant's homeland. Gordon & Rosenfeld, § 2.49c, p. 2-238. Nor does Congress repose the trust in alien soldiers that appellant suggests, Brief, pp. 21-22, 24, since it has barred them from holding commissioned offices in the Army, Navy and Marine Corps. 10 U.S.C. §§ 5571, 3285.* The fact that a resident alien

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* Citizenship for employment in the entire range of federal civil service positions was restored by Executive Order No. 11,935, 41 Fed. Reg. 37301 (1976), following this Court's invalidation of substantially identical Civil Service Commission regulations in *Hampton* v. *Mow Sun Wong, supra.*

pays taxes (as do citizens and non-resident aliens) does not entitle him to proportional public benefits much less entitles him to equal access to state public offices. *Kelly* v. *Pittsburgh,* 104 U.S. 78 (1881); *American Commuters Assoc. Inc.* v. *Leavitt,* 279 F. Supp. 40 (S.D.N.Y. 1967), *aff'd* 405 F.2d 1148, 1152-53 (2nd Cir. 1969); *Morton Salt* v. *City of South Hutchison,* 159 F.2d 897, 900-901 (10th Cir. 1947). See *Sugarman* v. *Dougall, supra* at 659 (REHNQUIST, J. dissenting).

The suggestion of appellant (Brief, pp. 10, 30, 31-32) and of the *Amici Curiae* (Brief, pp. 27-32) that the state interests encompassed by Executive Law § 215(3) can be achieved by a more narrowly drawn classification or by individualized determinations must be rejected. See also dissenting opinion, A. 60-A. 65. Every member of the State Police is engaged in preventing, detecting and prosecuting crime to keep public order and to preserve the political structure of the state. Majority opinion, A. 38 and discussion above, pp. 13-15. Every member is vested with specific governmental powers to achieve these ends. *Ibid.* No officer is without these powers, and none can be excused from invoking them. Connelie affidavit, D. 24-D. 26, D. 27-D. 32. Executive Law § 215(3) applies to this class of individuals alone. There are no State Police Officers who have failed to meet the citizenship requirement, and there never have been (D. 26-D. 27). Accordingly, the § 215(3) is narrowly drawn in light of New York's substantial purposes in qualifying its Police Officers. *Sugarman* v. *Dougall, supra* at 642 and cases cited above at p. 11. The use of individualized determinations would not advance any state interest since alienage itself is the relevant qualifying factor to be elicited. Moreover, the relationship between the individual and the state which § 215(3) seeks to protect is not amenable to test or measurement, *Perkins* v. *Smith,* 370 F. Supp. at 140, 141-42 (WINTER, J.

concurring), but only to naturalization, a process within the exclusive jurisdiction and control of Congress. *Id.* at 138 and at 141-42 (WINTER, J., concurring).

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Dated, New York, New York, August 23, 1977.

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of
the State of New York
Attorney for Appellee

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General
JUDITH A. GORDON
Assistant Attorney General
*Of Counsel**

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